Office - Supreme Court, U.S.
FILED
AUG 8 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 354

H. V. HICKINBOTHAM, ... Petitioner

vs.

A. B. CORDER, M. H. HERMAN, J. T. McKINNON, T. L. GOSSER, BILLY F. BAILEY, CALVIN L. BAILEY, O. E. FISER, O. R. STIGALL, J. L. HUDSON, J. A. WARD, D. G. DUNLAP, H. M. SHEA, L. D. MANNEY, W. L. MAYES, FRANK C. GALLOWAY, C. B. GALLOWAY, J. E. HOPSON, JR., C. H. McCRORY, F. M. TABOR, and T. B. TERRY, ... Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

KENNETH COFFELT,
902 Rector Building,
Little Rock, Arkansas,
Attorney for Petitioner.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	3
Statement of the Case	3
ARGUMENT:	
The decision sought to be reviewed deprives the petitioner of his right under the Fourteenth Amendment to the Federal Constitution, because:	5
Point 1. — The ordinance involved discriminates against grocerymen as a class, and petitioner as a citizen and business man, and deprives petitioner of the equal protection of the laws	5
Point 2. — The Court of Equity was without jurisdiction	5
Point 3. – There is not a scintilla of evidence upon which the decree can be based and allowed to stand	7
CONCLUSION	10

Page

Glover v. Malloska, 238 Mich. 216, 213 N. W. 107, 52 A. L. R., 77-83 6

Hickinbotham v. Williams, Chancellor, Arkansas Law Reporter, Dec. 17, 1956 (opinion filed with clerk) 5

Kelley v. Blackburn, et al., Supreme Court of Florida, May 15, 1957 (opinion filed with clerk) 5

Motor Car Dealers Association of Seattle, et al v. Fred S. Haines Company, et al, 128 Wash. 267, 222 Pac. 611, 36 A. L. R., 493-499 6

Olson v. City of Platteville, 251 N. W. 245, 91 A. L. R., 308-323 6

State v. Karston, 208 Ark. 703 6

CONSTITUTION

Fourteenth Amendment, Federal Constitution 3, 9

STATUTES

Arkansas Statutes of 1947, Sec. 41-3802 ..... 5, 12, 19, 20

Act 367 of 1957, Arkansas General Assembly (copy of act filed with clerk) 5

ORDINANCES

City of Little Rock, Arkansas, Ordinance No. 10206 (copied in full—Record 3-4) 12

TEXTS

American Jurisprudence, Vol. 12, p. 313, Sec. 620 9

American Jurisprudence, Vol. 28, pp. 336-347, Secs. 150, 151, 154, 155 ..... 6, 7, 9

A. L. R. 52, pp. 77-83 6

A. L. R. 36, pp. 493-499 6

A. L. R. 91, 308-323 6

APPENDIX 11-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. _____

H. V. HICKINBOTHAM, ... Petitioner

vs.

A. B. CORDER, M. H. HERMAN, J. T. McKINNON, T. L. GOSSER, BILLY E. BAILEY, CALVIN L. BAILEY, O. E. FISER, O. R. STIGALL, J. L. HUDSON, J. A. WARD, D. G. DUNLAP, H. M. SHEA, L. D. MANNEY, W. L. MAYES, FRANK C. GALLOWAY, C. B. GALLOWAY, J. E. HOPSON, JR., C. H. McCRORY, F. M. TABOR, and T. B. TERRY, ... Respondents

---

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Petitioner prays that a writ of certiorari issue to review the decision of the Supreme Court of Arkansas, of April 15, 1957, and the order of the court denying re-hearing May 13, 1957, which decision and order denying rehearing affirmed the judgment of the Chancery Court of Pulaski County, Arkansas, entered October 8, 1956.

OPINION BELOW

The opinion of the Supreme Court of Arkansas sought to be reviewed herein, is officially reported in the Arkansas Law Reporter, April 15, 1957. That opinion is reprinted in an Appendix to this petition at pages 11 to 23.

JURISDICTION

The judgment of the Chancery Court of Pulaski County, Arkansas, was entered October 8, 1956. (R. 19). The judgment was affirmed by the Supreme Court of Arkansas, April 15, 1957. (R. 67). Rehearing was denied by the Supreme Court of Arkansas, May 13, 1957. (R. 76). The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

There are three questions presented here for decision:

1.

Whether a municipal ordinance that prohibits grocery stores from staying open on Sunday, standing alone, and without the support of any basic state statute, is violative of the Federal Constitution.

2.

Whether a court of equity has jurisdiction to enjoin the owner and operator of a lawful, non-privileged and legitimate business, that is not a nuisance, from staying open on Sunday in violation of a City ordinance, when the law court is functioning properly by prosecutions for the violations.

If the jurisdiction exists, is there any evidence in the record upon which the decree can be based and allowed to stand.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Amendment Fourteen to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner is a white man and does not belong to the Communist party. He owns and operates a small grocery store in Little Rock, Arkansas. Respondents are also owners and operators of grocery stores in Little Rock. Respondents filed suit against petitioner in the Chancery Court of Pulaski County, Arkansas, praying that the Court construe the constitutionality of Ordinance 10206 of Little Rock, Arkansas, which is copied in the complaint, and also praying that petitioner be restrained from keeping his grocery store in Little Rock open on Sunday in violation of the ordinance, on the grounds that the property rights of respondents were being damaged by petitioner because it was unfair competition to respondents for petitioner to keep his store open on Sunday. (R. 2). The Chancellor decreed that the ordinance was constitutional, and permanently enjoined petitioner from keeping his store open on Sunday. The petitioner appealed to the Arkansas Supreme Court. The Supreme Court of Arkansas affirmed the decree of the Chancellor. The Supreme Court said that the ordinance was constitutional because it was based on the basic Arkansas Statute, Sec. 41-3802, Ark. Stats. 1947. The court sustained the injunction on the ground that

it was unfair competition to respondents for petitioner to keep his store open on Sunday. The 1957 Legislature of Arkansas repealed said Sec. 41-3802, Ark. Stats. by Act 367. That Act went into effect June 13, 1957. Petitioner, subsequent to June 13, 1957, filed his motion in the Arkansas Supreme Court to abate the injunction decree, alleging that since the passage of Act 367 of 1957 by the Arkansas Legislature, the ordinance of Little Rock standing alone, was violative of both the Federal and State Constitutions. The Supreme Court in a subsequent opinion on this motion, which opinion is also reprinted in the Appendix to this petition at page 11, denied the motion and held that the ordinance standing alone was constitutional, hence, the judgment could not be abated. Bond requirement in contempt litigation was involved in the motion and opinion, but this particular phase of the case is not now before this court.

ARGUMENT

THE DECISION SOUGHT TO BE REVIEWED DEPRIVES PETITIONER OF HIS CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION, because,

I.

The ordinance discriminates against grocerymen as a class, and petitioner as a citizen and businessman, and deprives petitioner of the equal protection of the laws.

The ordinance is pure and simple class legislation. The basic Arkansas Statute, Sec. 41-3802, upon which the Arkansas Supreme Court, in the case of *Hickinbotham v. Williams, Chancellor*, Arkansas Law Reporter, Dec. 17, 1956, originally held the ordinance to be constitutional, was repealed by Act 367 of the Acts of the Arkansas General Assembly of 1957, and went into effect June 13, 1957. A copy of this Act is furnished the court under separate cover filed with the Clerk. In the *Hickinbotham* v. *Williams, Chancellor*, case, *supra*, the court plainly said, "The ordinance is constitutional. It is based on our basic statute, Sec. 41-3802, and is consistent with this statute." The basic statute did not discriminate, because it applied to all businesses. Discrimination and equal protection of the laws cannot be reconciled.

Kelly v. *Blackburn, et al, Supreme Court of Florida, May 15, 1947.* (Opinion filed with Clerk).

II.

The Court of Equity was without jurisdiction.

This record presents nothing more, nor less, than the substitution of an equity court for a court of law in order to enforce a criminal statute by injunctive procedure in-

stead of by criminal prosecution. This procedure deprives petitioner of right to trial by jury. Petitioner was being arrested, and tried and convicted each week for the violation of the Sunday ordinance in the criminal law courts. There was no breakdown in the law enforcement in the law courts. The complaint is, that the penalty is not sufficient to deter violation. Petitioner's business is not a nuisance. It is not privileged, and it is legitimate. A denial to this petitioner of the right to trial by jury for the violation of a criminal offence, is a denial of due process of law.

Motor Car Dealers Association of Seattle, et al v. *Fred S. Haines Company, et al, 128 Wash. 267, 222 Pac. 611;*

36 A. L. R., 493-499;

Olson v. *City of Platteville, 251 N. W. 245;*

91 A. L. R., 308-323;

Glover v. *Malloska, 238 Mich. 216, 213 N. W. 107;*

52 A. L. R., 77-83;

State v. *Karston, 208 Ark. 703.*

In the Karston case, supra, *the state* by authority of statute, had enjoined because of a breakdown in law enforcement.

American Jurisprudence, Vol. 28, pp. 336-347, covers completely the jurisdiction of equity courts in injunction cases where it is sought to enjoin the violation of criminal statutes and ordinances.

"In accord with principles stated above, a court of equity will not interfere by injunction to restrain criminal acts merely because the criminal law is not enforced, even though such failure is through neglect or refusal of the officers charged with enforcement thereof, or because the punishment prescribed is insufficient. And the fact that

the trial court may take an erroneous view of the validity of a penal statute is no ground upon which equity can act to restrain violations of the statute." *American Jurisprudence, Vol. 28, Sec. 151, p. 343. See also, Secs. 154 and 155.* There must be an irreparable injury to property rights before equity will intervene to enjoin criminal acts, and this would be true regardless of whether the criminal law was being violated. In other words, damage to property is the test of equity jurisdiction to enjoin, and competition by keeping a business open on Sunday, standing alone, is not sufficient. *American Jurisprudence, Vol. 28, Secs. 154 and 155, p. 346, (and cases there digested.)*

III.

There is not a scintilla of evidence in the record upon which the decree can be based and allowed to stand.

There is not a scintilla of evidence in the record touching upon the proposition that the keeping open of petitioner's store on Sunday constituted a public nuisance. There is not a scintilla of evidence in the record that the enforcement of the ordinance involved by criminal prosecution had broken down, because petitioner was being arrested, prosecuted and fined for the violation of the ordinance each week in the criminal law courts. The plaintiffs had alleged that the penalty was insufficient to prohibit the violation, but that fact, if it is a fact, addresses itself to the legislative branch of the state government. There is not a scintilla of evidence in the record that petitioner by keeping his store open on Sunday damaged respondents, or their property, in any manner. Abstract of the complete testimony in the record, in this regard, is as follows:

A. B. CORDER, one of the plaintiffs, testified; that he operates a grocery store at 5911 Kavanaugh — Model

Supermarket. Been in business 15 years with $150,000 investment; business is highly competitive. When *numerous* grocery stores in *Pulaski Heights* area stayed open on Sunday it was highly detrimental to his business during the week. *This affected* his business $1000 a week. His store is 5 miles from Hickinbotham, which is in the 2300 block on Main in Little Rock. (R. 30).

O. E. FISER, one of the plaintiffs, testified; that he has a grocery store at 3226 High Street, Little Rock, with investment of $20,000; been there 15 years. When *grocery stores* were open on Sunday his business was off as follows; "On Saturdays and Mondays business it was detrimental to both of them", and he had a loss of sales. His sales have *picked up* on Saturdays and Mondays since grocery stores have closed on Sunday. His grocery store is 15 blocks from Hickinbotham's, little over a mile. (R. 41).

D. G. DUNLAP, one of the plaintiffs, testified; that he heard Mr. Fiser's and Mr. Corder's testimony with reference to the effect Sunday openings had on their business, and that effect on his business has been substantially the same as theirs. His store is 44 blocks from Hickinbotham's. (R. 44).

BILLY E. BAILEY, one of the plaintiffs, testified; that he heard the testimony of the previous witnesses with reference to the effect of the Sunday opening of grocery stores, and his experience was substantially the same as theirs. His store is 'about a mile, or maybe a mile and two blocks from Hickinbotham's." (R. 48).

Now this is absolutely all of the testimony in this record upon which the plaintiffs relied to make their case, and upon which the injunction decree has been sustained.

Not a single witness was even asked whether petitioner, or the keeping open of petitioner's store on Sunday had damaged the plaintiffs, or their property. Witness Corder said that when the grocery store stayed open on Sunday *in the Heights area where his store is located, five miles from Hickinbotham's store*, that this affected his business, and this is absolutely all the testimony in the case, and it is upon this testimony that the Arkansas Supreme Court sustained the Chancellor's injunction decree. Petitioner's business has, therefore, been closed up, taken over, and controlled by court order without any justification or excuse, whatsoever, in order to try to enforce a criminal ordinance by an equity court injunctive order.

The most that can be said for any value to be placed upon this testimony, is that possibly Hickinbotham's keeping his store open on Sunday was unfair competition to the plaintiffs, competitors in business, but it is uniformly held that unfair competition, standing alone, is not proof of damages to property that would justify injunction decree.

American Jurisprudence, Vol. 28, Secs. 154-155, pages 346-347.

Petitioner is, therefore, deprived of the free use of his property and the returns thereon, which constitutes the taking of his property without due process of law, because there is absolutely no evidence in the record upon which the decree can be based. To control petitioner's property without evidence to support the control, violates the letter and the spirit of the Fourteenth Amendment. A formal charge or accusation is never proof of anything.

"The case against the party asserting the protection of the due process guaranty must be made out by proof in the absence of a default," *American Jurisprudence, Vol. 12, p. 313, Section 620, (and cases there digested).*

"The law does not, however, protect one against law-

ful competition; loss or disturbance resulting therefrom is damnum absque injuria, and not ground for injunctive relief, nor are criminal acts of a competitor which do not amount to a nuisance and which cause no special injury to the complainant." *American Jurisprudence, Vol. 28, pp. 346-347, Sec. 155, (and cases there digested).*

"In order, however, to obtain relief by injunction against the commission of acts of a criminal character, on the ground of injury to the property rights of an individual, the court will require that the complainant *clearly show* such facts and circumstances in the particular case as will justify the court in granting the relief desired." *American Jurispruaence, Vol. 28, Sec. 150, p. 340, (and cases there digested).*

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

KENNETH COFFELT,
902 Rector Building,
Little Rock, Arkansas,
Attorney for Petitioner.

APPENDIX

OPINION OF THE SUPREME COURT OF ARKANSAS

HICKINBOTHAM v. CORDER

5-1253

Opinion delivered April 15, 1957

Appeal from Pulaski Chancery Court, Second Division; *Guy E. Williams*, Chancellor; affirmed.

PAUL WARD, Associate Justice. Involved is this question: Under what circumstances will a chancery court enjoin the violation of the penal provision of a city ordinance?

On July 9, 1956 the City of Little Rock enacted Ordinance No. 10206 which contains, among other provisions, the following which are pertinent to this case: Section 1 says it shall be unlawful for any person within the corporate limits of the city, on the first day of the week, commonly called Sunday, to open to the public any grocery store. Section 2 provides that any person violating the above provision shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than $25 nor more than $100 for each separate offense. It is not denied that appellant, H. V. Hickinbotham, has repeatedly violated the above ordinance, or that he threatens to do so in the future.

On August 17, 1956 appellees, A. B. Corder and some 20 other residents of Little Rock filed a complaint against appellant, H. V. Hickinbotham, making the City of Little Rock a party defendant also.

The essential allegations in said complaint are the following: The plaintiffs are engaged separately and in-

dividually in the retail grocery business in the City of Little Rock, being duly licensed, and they bring this action in their own behalf and on behalf of other citizens and residents of said City who are similarly situated or who desire to join therein; The defendant (Hickinbotham) is a resident of said City and is engaged in operating a retail grocery store; The plaintiffs have built up substantial property rights in their respective businesses; The City of Little Rock has passed the ordinance above mentioned: The plaintiffs, who are included in the terms of said ordinance, having no way to ascertain its constitutionality except to violate its provisions; Plaintiffs believe said ordinance is constitutional, but ask the court to enter a declaratory judgment construing its validity and constitutionality. The complaint further states: The defendant, Hickinbotham, has kept his place open on Sundays in plain and open defiance of the law, having done so over a period of years; Said defendant has indicated that he intends to continue to operate his grocery store on Sunday in the future; Said defendant is a competitor of the plaintiffs and other persons operating grocery stores within the City; That by his said conduct said defendant is causing the plaintiffs injury and damage and is unfairly competing with them in the conduct of their businesses, for which they have no adequate remedy at law. The complaint also states: That the penalty provided for the violation of said ordinance, which is limited by Ark. Stats. § 41-3802, is so small and inadequate as to render said statute ineffectual to protect the rights of the public, and to deter the defendant from openly and defiantly violating the aforementioned ordinance and statute. The prayer was for a declaratory judgment construing the validity and constitutionality of said Ordinance No. 10206, and for an order restraining and enjoining the defendant,

Hickinbotham, from further conducting a grocery store within the City of Little Rock on Sunday.

To the above complaint appellant, Hickinbotham, entered a special demurrer on the grounds that the court was without jurisdiction over the subject matter and the parties either to issue a declaratory judgment as prayed for or to enjoin appellant from operating a grocery store on Sunday. After the court had overruled his demurrers appellant, Hickinbotham, answered with a general denial, and also stated that the court was without jurisdiction over the subject matter or the parties.

After hearing the testimony of witnesses on both sides the chancellor, on October 8, 1956, entered a decree in favor of appellees, finding that the court has jurisdiction, and that said Ordinance 10206 is constitutional, and ordering Hickinbotham permanently enjoined from violating the provision of the said ordinance.

Appellant urges a reversal of the chancellor's decree on the grounds that (a) "The trial court was without jurisdiction over the parties or the subject matter", and (b) "The evidence is not sufficient to justify the finding, and judgment of the trial court."

(a) We have reviewed the authorities dealing with questions similar to the one here presented, and have come to the conclusion that the trial court had jurisdiction over both the parties and the subject matter. It is a general rule that chancery courts will not enjoin the commission of a criminal offense when such commission is the only thing involved. It is equally well settled that chancery courts have jurisdiction, in many instances, to enjoin the commission of a nuisance. This court on two different occasions, in *State* v. *Vaughan*, 81 Ark. 117, 98 S. W. 685,

and *Meyer* v. *Seifert*, 216 Ark. 293, 225 S. W. 2d 4, has said: "The criminality of the act will neither give nor oust jurisdiction in chancery."

From our analyses of the several decisions of this court it appears that when two elements are present or two conditions exist chancery court will assume jurisdiction to enjoin the commission of a criminal offense. One, when the enforcement of the criminal law will not deter violation. Two, the complaining party or parties must show an injury.

One. Inadequacy of the enforcement of criminal laws takes many forms and may be expressed in several different ways. In the *Vaughan* case, *supra*, it was noted that the criminal processes are inadequate to afford relief "from connivance of the officers or other persons." Equity jurisdiction was justified in *State Ex Rel. Attorney General* v. *Karston*, 208 Ark. 703, 187 S. W. 2d 327, this way: "We sum up: by the weight of authority, equity may act to suppress a public nuisance, even though the maintenance of the nuisance is a crime, where there is alleged in addition to the public nuisance, some facts which show the remedy at law, by prosecution of the criminal, *is inadequate and incomplete to effect relief.* (emphasis supplied)". The same idea was expressed in different words in the *Seifert* case, *supra*, where the court said: "It is characteristic of most instances in which injunctions against criminal acts are sustained that the threat of *punishment after the event will not have a very strong deterrent effect upon the offender* (emphasis supplied)". 52 L. R. A. 79 contains annotations from numerous decisions of other jurisdictions which hold, in varying language, that equity jurisdiction may be invoked where the enforcement of criminal statutes does not afford adequate protection against injury to prop-

erty rights. Typical of these holdings is the one set forth in *United Traction Co.* v. *Smith*, 187 N. Y. Supp. 377, where we find this language: " 'While the regular remedy for the prosecution of those who violate the penal laws of the state lies in arrest and punishment, the court will not compel parties whose rights are clear to rely on peace officers to protect them in their enjoyment of those rights. 'There is a preventive as well as a remedial justice'."

Two. In order to invoke injunctive relief in chancery court it is not enough, of course, to show merely that the criminal laws are not being properly enforced, for whatever reason, but it is also necessary to show that the complaining party has been injured in some way, either involving property rights or civil rights. In many cases of this nature coming before this court the complaining party was the State. In such instances it is held that there must be shown an injury of a public nature, such as a public health or public welfare. Such instances are the *Vaughan* case, *supra*, and the *Lyric Theater* v. *State*, 98 Ark. 437, 136 S. W. 174. In the former case the court said: ". . . if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin, notwithstanding the act enjoined may also be a crime." In the *Lyric Theater* case, *supra*, it stated that "before an injunction could issue restraining acts constituting a public nuisance, it was necessary that the public nuisance should affect the civil or property rights or privileges of the public, or the public health; . . ." It is of course easy to understand why the injury must be of a public nature where the State itself is seeking the injunction.

If however, as in the case under consideration, certain individuals are seeking injunctive relief it is necessary only that the injury be to their personal property rights. In the *Vaughan* case, *supra*, this court recognized the jurisdiction of chancery court to enjoin the violation of a criminal offense where an injury was threatened to the property rights of individuals. There the court quoted with approval: "The difference between a public nuisance and a private nuisance is that one affects the public at large and the other only the individual. The quality of the wrong is the same and the jurisdiction of the courts over them rests upon the same principle and to the same extent." In the *Seifert* case, *supra*, Myer, on behalf of himself and other property owners, sought to enjoin Seifert from violating City Ordinances No. 277 and 386 of the City of Stuttgart which prohibited the erection of a frame building in a restricted district. The court upheld appellant's right to injunctive relief on the ground that the plaintiff "made a substantial showing of probable damages to his own and other adjoining properties . . ." even though it was urged ". . . that the ordinance prescribes criminal punishment, making violation a misdemeanor punishable by fine . . ."

In the *Karston* case, *supra*, where injunctive relief was upheld to prevent the commission of a crime, there was present the element of lack of adequate law enforcement but not the element of injury to property. Thus, on first impression, that case might appear to contradict the "two elements" rule we have just announced above, but a closer study shows such is not the case. There the court recognized the general rule as we have stated it, and then said: "The question then, is, does the complaint here allege 'some other ground of equity jurisdiction, calling for injunction'." The court then found the "other ground" to be that, at common law, the maintenance of an open gam-

bling house in violation of law was a public nuisance, and, as such, could be enjoined.

(b) We do not agree with appellant that the evidence is insufficient to support the findings and judgment of the trial court. Several witnesses stated that their businesses, as grocerymen, were adversely affected by reason of the fact that appellant kept his grocery store open on Sundays. One witness said her business was thus affected to the extent of $1,000. All of appellants had made large investments in the grocery business, varying from $20,000 to $150,000. There was introduced no evidence to the contrary.

During the trial appellant objected to the court's rulings on several matters regarding the introduction and exclusion of testimony, but these matters are not listed in his "Points" nor are they discussed in his brief.

Affirmed.

Chief Justice Harris and Justice Millwee concur.

IN THE SUPREME COURT OF ARKANSAS

November Term, 1956

May 13, 1957

REHEARING PETITION DENIED

The petition for rehearing in the following case is denied:

5-1253 H. V. Hickinbotham v. A. B. Corder, et al. (R. 76).

SUPREME COURT OF ARKANSAS

Nos. 4881, 4882, and 5-1253

Opinion delivered July 1, 1957

No. 4881 J. H. HICKINBOTHAM, Petitioner, V. GUY E. WILLIAMS Chancellor, Respondent,	Motions of petitioners to modify bonds.
No. 4882 H. V. HICKINBOTHAM, Petitioner, V. GUY E. WILLIAMS, Chancellor, Respondent,	Motions denied.
No. 5-1253 H. V. HICKINBOTHAM, Appellant, V. A. B. CORDER et al., Appellees.	Motion of appellant to vacate judgment. Motion denied.

GEORGE ROSE SMITH, J. Motions filed in this court by the Hickinbothams in these three cases present

the question of whether a Little Rock ordinance requiring grocery stores and meat markets to close on Sunday was repealed by the passage of Act 367 of 1957, which became effective ninety days after the legislature adjourned on March 14 of this year.

For more than a hundred years there was in force a state statute requiring retail stores to remain closed on Sunday. Ark Stats. 1947, § 41-3802. On July 9, 1956, under the authority of this statute, the city council of Little Rock adopted an ordinance making it unlawful for any person to operate a grocery store or meat market within the city on the Sabbath. This ordinance was upheld last December, it being then contended that the singling out of grocery stores and meat markets is such an unreasonable classification as to deny the equal protection of the laws. *Hickinbotham* v. *Williams*, ___ Ark. ___, 296 S. W. 2d 897, cert. den. ___ U. S. ___. In April of this year we affirmed a chancery court decree by which H. V. Hickinbotham was permanently enjoined from operating a grocery store on Sunday. *Hickinbotham* v. *Corder*, ___ Ark. ___, 301 S. W. 2d 30. Although our affirmance in the *Corder* case became final several weeks ago, Hickinbotham now moves that the judgment be vacated on the ground that Act 367 rendered the city ordinance ineffective. This motion must be denied, for an application to modify or dissolve an injunction should properly be presented in the first instance to the trial court. *Local Union No. 656* v. *Mo. Pac. R. Co.*, 221 Ark. 509, 254 S. W. 2d 62.

After the decree in the *Corder* case had been affirmed by this court the chancellor cited H. V. and J. H. Hickinbotham for contempt and sentenced them to jail for having continued to operate a grocery on Sunday, in disregard of the injunction. The proceedings to review those two cita-

tions for contempt are not yet ready for submission to this court on the merits, but at a preliminary hearing we admitted the Hickinbothams to bail on condition that they cease doing business on Sunday until the final decision of this court. We are now asked to strike this condition from the bail bonds and permit the petitioners to conduct a Sunday business during the pendency of their appeals from the sentences for contempt.

The Hickinbothams' argument is to this effect: The city ordinance closing grocery stores on Sunday was adopted pursuant to the state statute on the subject. That statute was repealed by Act 367. Hence, it is said, Act 367 nullified the city ordinance as well, and, until the city council passes a new ordinance under the authority of the 1957 act, there is no law prohibiting the operation of a grocery store on Sunday in the city of Little Rock.

This reasoning is not sound. It is true that if Act 367 had been limited to a simple repeal of the state Sunday law it would also have abrogated ordinances that depended on that law for their validity. McQuillin on Municipal Corporations (3d Ed.), § 21.43. But Act 367 goes beyond a mere repeal of Ark. Stats., § 41-3802; the first section of the 1957 act reads as follows: "Hereafter, the city council or board of managers of any city or incorporated town shall have the authority, by ordinance, to regulate the operation of businesses within such cities or towns on Sunday." Section 2 of the act then repeals the state statute on the subject.

It is clear that the General Assembly, in enacting the 1957 law, intended (*a*) to repeal the general state statute requiring all retail businesses to close on Sunday and (*b*) to leave unimpaired the power of cities and towns to regulate the doing of business on Sunday within their corporate

limits. It follows that there was no break in the continuity of the city's authority and therefore no need for the city council to go through the formality of re-enacting its 1956 ordinance, which presumably still represents its will in the matter.

The authorities are uniform in holding that existing city ordinances are not affected by the repeal of the state enabling act if the repealing statute simultaneously re-enacts the provisions of the original law. *Allen* v. *City of Davenport*, 107 Iowa 90, 77 N. W. 532; *People* v. *Brennan*, 142 Misc. Rep. (N. Y.) 225, 255 N. Y. S. 331. As McQuillin puts it in § 21.46 of his treatise: "Accordingly where pursuant to statute an ordinance is passed and subsequently the statute is repealed but re-enacted, the ordinance remains unimpaired. The statutory change does not have the effect of annulling the ordinance passed under the former identical grant of authority." Of course the new statute need not be in the exact language of the old; the decisive question is whether the legislature has manifested its intention to keep in force the relevant portion of the original law. *State* v. *Prouty*, 115 Iowa 657, 84 N. W. 670. In the case at bar we find no reason to doubt that this legislative intention existed. In drafting Act 367 the General Assembly obviously could not accomplish its two-fold purpose by a verbatim re-enactment of the existing state Sunday law, for the mandatory state-wide application of the old act was to be rescinded. In the same breath, however, the legislature expressed its desire to leave undisturbed the delegated authority by which each municipality might regulate Sunday businesses according to its own preference. That Section 1 of Act 367 begins with the word "hereafter" evidently does not mean that a new power is being created, for the municipality's authority undeniably existed already. Rather, the use of "hereafter" merely im-

plies that a power formerly exercised concurrently by the state and its municipalities is in the future to be vested in the cities and towns alone. We find no good reason in logic or in law to require the city of Little Rock and all other municipalities to reassert their views by needlessly re-enacting ordinances already on the books.

Motions denied.

Ward, J., dissents.

SUPREME COURT OF ARKANSAS

Nos. 4881, 4882, and 5-1253

J. H. Hickinbotham, Petitioner, v. A. B. Corder, Respondent. (any other related cases)	Opinion Delivered July 1, 1957 Appeal from Pulaski Chancery Court. DISSENT.

PAUL WARD, Associate Justice

I do not agree with the majority that the injunction remained in force after the effective date of Act 367 of 1957.

I do not think that the right to "regulate" as the word is used in Section 1 of Act 367 carries with it the right to prohibit [the opening of grocery stores and other stores on Sunday] as must be applied in Ark. Stats. § 41-3802.

My conclusion is therefore that if Little Rock hereafter wants to "regulate" business houses on Sunday, it will be necessary to pass a new ordinance to that effect.

Practical considerations lead to this same conclusion. Neither this court nor any other court should be burdened with the task of attempting to reconcile all of the divergent views on this question. Now that the slate has, so to speak, been wiped clean by said Act 367 any new attempts at regulation should, I think, be enacted by the people of the affected municipalities.

Harris, C. J., joins in this dissent.